Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Core Communications, Inc.	)	
	)	WC Docket No. 03-171
Petition for Forbearance from Application of the ISP Remand Order	)	
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	)	
	)	

COMMENTS OF THE CONSUMER ADVOCATE DIVISION OF THE WEST VIRGINIA PUBLIC SERVICE COMMISSION IN SUPPORT OF CORE COMMUNICATIONS PETITION FOR FORBEARANCE

In accordance with the pleading cycle established in the Public Notice released July 18, 2003, in this proceeding, the Consumer Advocate Division of the West Virginia Public Service Commission ("WVCAD") hereby submits its comments in support of Core Communications, Inc.'s ("Core") petition for Commission forbearance from application of the *ISP Remand Order*.[1]

I. INTRODUCTION.

To say that the *ISP Remand Order* has been the source of controversy is something of an understatement. Beginning with then-Commissioner Furchtgott-

[1] "Order on Remand and Report and Order," *I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, *et al.* (Rel. April 27, 2001) (*ISP Remand Order*)

Roth's blistering dissent, through the D.C. Circuit Court of Appeals rejection and remand of the Commission's rationale, the *ISP Remand Order* has been at the epicenter of controversy in telecommunications regulatory policy. Even in West Virginia – by no stretch of the imagination a hotbed of telecommunications regulatory policymaking – the *ISP Remand Order* has been the source of confusion and controversy.

From the WVCAD's perspective, it would have been preferable had the D.C. Circuit vacated the entire *ISP Remand Order*, as it did with regard to the Commission's 1999 declaratory ruling that preceded the *ISP Remand Order*.[2] In fact, given the Commission's willingness to interject itself into matters dealing with intrastate telecommunications over which state commissions have traditionally exercised jurisdiction – something the Commission refrained from doing in the *ISP Ruling* – *vacatur* by the D.C. Circuit was especially warranted.

Unfortunately, the D.C. Circuit decided to leave the interim intercarrier compensation mechanism established in the *ISP Remand Order* in place while the Commission attempts to articulate the basis upon which it claims to assert exclusive jurisdiction over Internet-bound traffic. Core's petition gives the Commission the opportunity to set matters aright. WVCAD urges the Commission

[2] *See* "Declaratory Ruling," *I/M/O Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, *et al.* (Rel. Feb. 26, 1999) (*ISP Ruling*).

to take advantage of that opportunity.

II. THE STANDARD FOR FORBEARANCE GENERALLY.

The standards for Commission forbearance are set forth in Section 10 of the Communications Act of 1934 (Act), which provides:

> [T]he Commission shall forbear from applying any regulation or any provision of th[e] Act to a telecommunications carrier . . . in any or some of its . . . geographic markets, if the Commission determines that (a) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier . . . are just and reasonable and are not unjustly or unreasonably discriminatory; (b) enforcement of such regulation or provision is not necessary for the protection of consumers; and (c) forbearance from applying such provision or regulation is consistent with the public interest.

47 U.S.C. § 160(a). In connection with determining whether forbearance is consistent with the public interest, the Commission considers whether forbearance will "promote competitive market conditions, including whether it will enhance competition among existing telecommunications service providers." 47 U.S.C. § 160(b); *see also* "Second Report and Order," *I/M/O Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications*

Carriers, WT Docket No. 98-100, FCC 03-203, ¶ 2 (Rel. Aug. 20, 2003).

III. FORBEARANCE FROM ENFORCING THE *ISP Remand Order* IS APPROPRIATE.

A. Enforcement Of The *ISP Remand Order* Is Not Necessary To Ensure Just, Reasonable And Nondiscriminatory Charges, Practices, Etc. In Connection With Telecommunications Carriers' Service.

Enforcement of the *ISP Remand Order* is not necessary to ensure just, reasonable and nondiscriminatory charges, practices, etc. in connection with telecommunications carriers' service. In fact, the opposite is true. Forbearance from enforcement of the *ISP Remand Order* is necessary in order to obtain just, reasonable and nondiscriminatory charges, practices, etc. in connection with the provision of telecommunications services by the incumbent local exchange carriers ("ILECs") – the class of carriers who benefitted from the *ISP Remand Order*.

1. The D.C. Circuit's Invalidation of The Commission's Rationale for Asserting Jurisdiction Over ISP-Bound Traffic Suggests That Carriers' Charges, Practices, etc. In Compliance With The *ISP Remand Order* Are Unjust, Unreasonable and Discriminatory.

As the Commission is well aware, its rationale for asserting exclusive jurisdiction over ISP-bound traffic (*i.e.*, that such traffic is "information services" under Section 251(g) of the Act, not subject to Section 251(b)(5) of the Act), was roundly rejected by the D.C. Circuit Court of Appeals. *WorldCom, Inc. v. F.C.C.*, 288 F.3d 429, 432-34 (D.C. Cir. 2002). However, the Court left in place the Commission's intercarrier compensation mechanism, on the grounds that the Court "can't yet know the legal basis for the Commission's ultimate rules, or even what those rules may prove to be," and therefore lacked a "meaningful context in which to assess these explicitly transitional measures." *Id.* at 434.

The Court's decision to leave the Commission's intercarrier compensation mechanism in place was unfortunate for, rather than taking the Court's cue, the Commission has left in place a mechanism that is based on a patently invalid assertion of jurisdiction and that has resulted in shifting millions of dollars either to competitive local exchange carriers ("CLECs") or their customers. Moreover, the Commission has left in place an order that, at one stroke, eliminated reciprocal compensation mechanisms developed by numerous state commissions in full-blown, evidentiary proceedings to establish TELRIC-based rates – despite the paucity of evidence supporting the intercarrier compensation rates established by the Commission.

Finally, the Commission left in place its "mirroring rule."[3] By this provision, the Commission "boot-strapped" its intercarrier compensation mechanism for ISP-bound traffic, traffic over which it asserted dubious jurisdictional claims, to establish compensation rates for all Section 251(b)(5) traffic, including local traffic

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[3] *ISP Remand Order*, at ¶ 89.

over which state commissions generally have jurisdiction. This action was bad enough, but the Commission's "mirroring rule" also vested ILECs with sole discretion whether to make the interim intercarrier compensation rates apply to all Section 251(b)(5) traffic. *Id.* This decision affected untold numbers of carrier interconnection agreements. Worse still, the Commission provided no guidance regarding how ILECs are to implement this decision, or whether the ILECs are to even communicate their decision to state commissions that are responsible for arbitrating or mediating disputes relating to those agreements.

The result of the Commission's *ISP Remand Order* and the D.C. Circuit's remand without *vacatur*, has been to create an open invitation for ILECs to take unilateral action to deny CLECs compensation to which they are entitled and to force CLECs to expend time and money in litigation to check such ILEC actions. The ILECs have not hesitated to accept this invitation.[4]

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[4]With remarkable prescience, Commissioner Furchtgott-Roth decried the uncertainty created by the Commission's *ISP Remand Order*, and the litigation it would invariably spawn. "Dissenting Statement of Commissioner Harold Furchtgott-Roth," *ISP Remand Order*, at 64 & 70. Commissioner Martin expressed similar concern in his dissent in the Commission's arbitration of Starpower's interconnection agreement with Verizon Virginia Inc. "Memorandum Opinion and Order," *I/M/O Starpower Communications v. Verizon South*, FCC 020-105, 17 FCC Rcd. 6873, 6895 (April 8, 2002). The D.C. Circuit noted Commissioner Martin's dissent in its July 18, 2003, remand of the Commission's decision in that proceeding. *See Starpower v. FCC*, 334 F.3d 1150, 1154 (D.C. Cir. 2003).

For example, in Section 271 proceedings in West Virginia, Verizon's witness admitted that the company has not paid any compensation for ISP-bound traffic over the Commission's 3:1 ratio but which was within the growth caps established by the Commission.[5] Subsequently, Verizon-WV admitted that it has paid no compensation for traffic over the Commission's 3:1 ratio in West Virginia based on its self-serving misinterpretation of the West Virginia commission's decisions attempting to implement the Commission's orders regarding ISP-bound traffic.[6] Moreover, some CLECs in West Virginia questioned whether Verizon-WV elected to make the FCC's intercarrier compensation rates applicable to all Section 251(b)(5) traffic under the Commission's "mirroring rule." As discussed below (*see* footnote 11, *infra*), this election was not valid since it apparently was made by industry-wide letter authored by the state operating company's parent rather than by the operating company itself on a state-specific basis. Uncertainty over the election was reinforced by Verizon-WV's admission that it has subsequently continued to pay reciprocal compensation at state commission-established rates for traffic under the Commission's 3:1 ratio, conduct clearly at odds with the notion of invoking the Commission's "mirroring rule."

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[5] *See* Transcript of Proceedings," Vol. I, *Verizon-WV*, Case No. 02-0809-T-P, at 147-48 (Nov. 6, 2002).

[6] "Verizon Initial Br.," *FiberNet, LLC*, Case No. 03-0024-T-P, at 5-6 (Filed, July 14, 2003).

The WVCAD does not, for one minute, believe that the muddled situation in West Virginia is exceptional. In other states, ILECs have refused to pay reciprocal compensation for ISP-bound traffic, even under interconnection agreements that pre-dated the *ISP Remand Order*.[7] The ILECs' efforts to "welsh" on their reciprocal compensation obligations, in violation of their interconnection agreements, was encouraged by the Commission's discredited rulings regarding ISP-bound traffic. CLECs' fights to defeat the ILECs' efforts, although universally successful, have cost them much in blood and treasure. It takes time and money to litigate before state commissions. It takes even more time and money to litigate through the federal courts. Meanwhile, the CLECs do not receive compensation to which they are entitled, forcing them to absorb their litigation and operating costs until their day of victory. There can be little doubt that the ILECs' efforts, emboldened by the Commission's rulings, have hampered CLECs' attempts to gain a foothold in the local telecommunications market.

2. At Least Some ILECs Have Unilaterally Applied The *ISP Remand Order* to Exclude Compensation For ISP-Bound

[7] *See, e.g., Michigan Bell Telephone Co. v. MFS Intelenet of Michigan,* ___ F.3d __, 2003 WL 21146045 (6th Cir., May 20, 2003); *Verizon Northwest v. WorldCom,* 61 Fed. Appx. 388, 2003 WL 1827229 (9th Cir., April 7, 2003); *Verizon Northwest v. Electric Lightwave*, 63 Fed. Appx. 293, 2003 WL 1827239 (9th Cir., April 7, 2003); *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114 (9th Cir. 2003); *Starpower Communications v. FCC*, 334 F.3d 1150 (D.C. Cir. 2003);

Traffic Even at the Commission's Interim Rate Caps.

Verizon Maryland v. RCN Telecom Services, Civil No. S-99-2061 (N.D. MD, March 5, 2003).

Moreover, at least some ILECs have unilaterally applied the *ISP Remand Order* to deny compensation for ISP-bound traffic for traffic exceeding the Commission's 3:1 ratio but within the growth caps established in the *ISP Remand Order*. For example, in recent proceedings before the West Virginia public service commission, Verizon-WV admitted that it had not paid compensation at any rate – either the state-approved reciprocal compensation rates or the Commission's interim carrier compensation rates – for terminating traffic in excess of the 3:1 ratio.[8] Instead, Verizon-WV asserted that the Commission's *ISP Remand Order* put all traffic exceeding the 3:1 ratio on a bill-and-keep regime, despite the fact that such traffic was being exchanged with CLECs pursuant to interconnection agreements in effect at the time of the Commission's *ISP Remand Order*.[9] Furthermore, as previously noted, Verizon-WV made no effort to claim that it had opted to make all Section 251(b)(5) traffic subject to the Commission's intercarrier compensation rates pursuant to the Commission's "mirroring rule."

Thus, the Commission's ruling in the *ISP Remand Order* has emboldened ILECs to take liberties even with the Commission's dictates. Again, this has caused CLECs to incur costs in the form of litigation costs and increased expenses associated with terminating traffic from the ILEC in excess of the 3:1 ratio. But for the Commission's *ISP Remand Order*, the CLECs would not have incurred these

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[8]"Verizon Initial Br.," FiberNet, LLC, Case No. 03-0024-T-P, at 2 (Filed, July 14, 2003).

[9]*Id.*, at 5-6.

costs.

3. On Its Face, the *ISP Remand Order* Discriminates Against CLECs.

In its petition for forbearance, Core addresses in detail the manner in which the *ISP Remand Order* discriminates against CLECs, focusing on new entrants. The WVCAD concurs in, and joins with, Core's arguments regarding the discriminatory impact on new entrants.

But the *ISP Remand Order* does not discriminate against new entrants only – it also discriminates against CLECs that were operating in the local market on the order's effective date by application of the Commission's "mirroring rule." That rule, buried under the innocuous heading "Relationship to Section 251(b)(5)," gives ILECs the power to unilaterally determine what rates will apply to all Section 251(b)(5) traffic exchanged between carriers.[10]

[10] *ISP Remand Order*, at ¶ 89.

The Commission adopted its "mirroring rule" ostensibly out of concern over "the superior bargaining power of incumbent LECs" and their ability to "pick and choose" among intercarrier compensation regimes. To deal with this problem, the Commission decided to make its intercarrier compensation rate caps applicable only if the ILEC offers to exchange all Section 251(b)(5) traffic at those rates.[11]In

[11]*Id.* One glaring deficiency in the Commission's "mirroring rule" was the Commission's failure to provide any detail regarding just who makes the "offer" and how that "offer" is to be made in any particular state. For example, Verizon Corporation – the parent of the various incumbent operating companies – simply sent an industry letter to all CLECs in its operating companies' states. See "Verizon Industry Letter Re: Order on Remand" (May 21, 2001) (available at http://www22.verizon.com/wholesale/clecsupport/content/0,16835,east-wholesale-resources-clec_01-05_21,00.html. Unfortunately, Verizon Corporation is not an ILEC in any particular state, so it is unclear whether the "offer" contained in its industry letter conformed to the provisions of the Commission's "mirroring rule." As previously noted, in a recent proceeding before the West Virginia commission (*FiberNet*, Case No. 03-0024-T-P), Verizon-WV has consistently behaved as though that offer was ineffective, since it has continued to pay CLECs for terminating traffic at the state commission-established reciprocal compensation rates. Nor did Verizon-WV assert that it had availed itself of the Commission's "mirroring rule" in that proceeding.

other words, given the ILECs' monopoly position in the local telecommunications market, the Commission was concerned that the ILECs would engage in their own regulatory arbitrage to saddle CLECs with rates that benefitted the ILECs and disadvantaged the CLECs.

While the Commission correctly recognized that ILECs would seek to use the *ISP Remand Order* to their own advantage, and sought to provide prophylactic measures to limit such efforts, the "mirroring rule" failed of that purpose because it gave ILECs the sole power to determine which rates should apply without any opportunity for CLEC input through interconnection negotiations, for example. If the ILEC is advantaged by exchanging all Section 251(b)(5) traffic at the Commission's intercarrier compensation rates, it can "offer" (*i.e.*, force) those rates to a CLEC. If the ILEC is disadvantaged by applying the Commission's intercarrier

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The other problem with the Commission's "mirroring rule" was the lack of clarity regarding how ILECs communicate the "offer" to exchange all Section 251(b)(5) traffic at the Commission's interim rates. The WVCAD does not believe that an industry letter suffices – especially one containing as many reservations and conditions as that contained in Verizon Corporation's letter. See "Verizon Industry Letter Re: Order on Remand" (May 21, 2001) (available at http://www22.verizon.com/wholesale/clecsupport/content/0,16835,east-wholesale-resources-clec_01-05_21,00.html. Verizon Corporation did not deign to provide notice of its offer to the West Virginia commission and the WVCAD assumes that other state commissions were similarly left in the dark.

compensation rates to all Section 251(b)(5) traffic, then it can elect not to "offer" (*i.e.*, refuse) those rates to a CLEC. It is difficult to see how the ILECs' power to "pick and choose" between rates was seriously curtailed by the Commission's "mirroring rule."

By conferring exclusive power to determine compensation rates upon the ILECs, the Commission provided the ILECs with a competitive advantage not enjoyed by CLECs. This clearly discriminates among carriers in favor of ILECs.[12]

B. Enforcement Of The *ISP Remand Order* Is Not Necessary For The Protection Of Consumers.

The WVCAD concurs with, and joins in, Core's arguments that enforcement of the *ISP Remand Order* is not necessary for the protection of consumers. However, there are several additional reasons, not mentioned by Core, why enforcement of the *ISP Remand Order* is not necessary for the protection of consumers.

1. The Commission's Concerns With Regulatory Arbitrage Were Disproportionate to the Threat.

[12]To the extent the Commission adopted the "mirroring rule" without having provided adequate notice that such a rule was contemplated, that aspect of the *ISP Remand Order* appears particularly flawed.

It is no secret that the *ISP Remand Order* was the product of intensive lobbying by ILECs. The specter of regulatory arbitrage by CLECs "milking" hefty reciprocal compensation rates by targeting their service at Internet service providers ("ISPs") was the bogeyman conjured by the ILECs for the Commission. And it was this bogeyman that drove the Commission to issue the *ISP Remand Order*,[13] (and presumably the previously vacated *ISP Ruling*). The WVCAD believes that the potential harms of regulatory arbitrage were exaggerated.

While it is beyond the scope of the current proceeding to go into the flaws in the regulatory arbitrage argument that prevailed with the Commission, some consideration must be given that argument in order to put the current state of affairs in the local telecommunications market into context.

The most glaring flaw in the regulatory arbitrage argument endorsed by the Commission was the fact that such conditions could exist only in those states whose commissions had adopted a "calling party's network pays" ("CPNP") reciprocal compensation regime. In those states that had adopted "bill and keep," there was no opportunity for regulatory arbitrage. A bill and keep regime was adopted by commissions in many states where local competition was most likely to gain a foothold (*i.e.*, those states with large, densely populated urban and suburban areas). Certainly, ILECs in these states were not going to be subject to CLEC regulatory arbitrage.

[13] *See ISP Remand Order*, at ¶¶ 69-71.

Moreover, in those states that adopted CPNP regimes, the actual experience with competition does not suggest that CLECs engaged in regulatory arbitrage. For example, West Virginia adopted a CPNP regime in early 1997, with fairly high reciprocal compensation rates.[14] Yet the evidence is clear that CLECs did not flock to the state to grab ISPs, soak the dominant ILEC for reciprocal compensation, and use this windfall to rapidly build market share or profits. CLECs' relative market share in West Virginia remained very low from 1997

[14] *See* "Commission Order," *Bell Atlantic - WV*, Case No. 96-1516-T-PC, *et al.*, at 71-76 (April 21, 1997)(Public Version). Pursuant to those proceedings, the Commission established two-tiered reciprocal compensation rates – a rate for traffic delivered for termination to end offices of $0.002379/minute of use, and a rate for traffic delivered for termination to serving access tandems of $0.002618/minute of use. *See id.,* at 75-76; *see also* "Commission Order," *Bell Atlantic - WV,* Case No. 96-1516-T-PC, *et al.*(April 16, 1999), *approving* SGAT Exhibit A..

through 2002.[15] Furthermore, CLECs' profits experienced no sharp growth during this period, nor were Verizon-WV's profits visibly impacted by regulatory arbitrage during the same time.[16]

[15]By August 2002, CLECs held a total market share of 5.1%, up from 4.2% in March that year. "Commission Order," *Verizon-WV*, Case No. 02-0809-T-P, at 90 (Jan. 9, 2003). The vast majority of this market share was controlled by one facilities-based CLEC, FiberNet, LLC. which, according to the latest USAC data, controlled about 37,000 access lines out of 950,000 total (about 3.8%) as of the Third Quarter of 2003. *See* USAC Appendix HC01,"High Cost Support Projected by State by Study Area - 4Q2003," *and* USAC Appendix HC21, "CETC Reported Lines by Incumbent Study Area - High Cost Model Support - 4Q2003." Obviously, the local market share controlled by facilities-based CLECs from 1997 to 2002 was much smaller.

[16]For example, Verizon-WV's income statements for the calendar years 1997 through 2002, filed with the state commission, indicated that the company's intrastate net operating income generally increased each year, from $66.5 million as of December 31, 1997, to $95.7M as of December 31, 2001. The income statements for Verizon-WV's largest facilities-based competitor, FiberNet, does not reflect disproportionate income from regulatory arbitrage of ISP-bound traffic. According to annual reports filed with the West Virginia commission, FiberNet reported increasing net operating losses each year from 1999 through 2001 (from a loss of $1.45 million in 1999 to a loss of $4.86 million in 2001). Only in 2002, after the ISP Remand Order's release, did FiberNet report a net operating gain of $550,000.

Another factor that the Commission did not consider was the relationship of state commission-established rates for interconnection and unbundled network elements ("UNEs") to the potential for regulatory arbitrage. If state commissions set high UNE rates, facilities-based CLECs (the relevant focus since resellers do not receive reciprocal compensation) were less likely to enter the local market, even if CPNP regimes were established in those states. This was the experience in West Virginia, at least, and the WVCAD believes West Virginia's experience was not unique. The West Virginia commission established a CPNP regime in April 1997 – at the same time it established UNE rates that were among the highest in the country.[17] As discussed above, facilities-based competition did not really begin to occur in the state until 2001 and Verizon-WV's profits remained healthy during the entire period.

2. ILECs Have Been Able to Win Back Many ISPs By Offering Virtual NXX Service.

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[17] *See* Billy Jack Gregg, *A Survey Of Unbundled Network Element Prices in the United States* (Updated July 1, 2001), Table 1 (http://www.cad.state.wv.us/Intro%20to%20Matrix%20July%202001.htm).
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One of the concerns underlying the Commission's *ISP Remand Order* was the assumption that CLECs would be able to "cherry pick" ISPs by offering them very attractive rates and recouping any lost revenues associated with offering such rates through reciprocal compensation payments.[18] Certainly this may have been the experience in some states, though as discussed above, it was not the experience in West Virginia.

However, ILECs fairly quickly devised a strategy to retain or win-back ISP customers. ILECs began offering virtual NXX service – such as 500 or 555 hubbing service – to their ISP customers. This service allows the ILEC to market 500/555 service to ISPs, who in turn find such service attractive because their customers can access the ISPs' modems from anywhere within the LATA (in the case of 555 dialing) and such calls are treated, for all practical purposes, as local calls. In West Virginia, at least, the ILEC has resisted any effort to allow CLECs to provision their own 555 service over local interconnection trunks, insisting that such service be provisioned over the ILEC's interexchange trunks with associated access charges applying. *See* "Verizon Initial Br.," *North County Communications v. Verizon-WV*, Case No. 02-0254-T-C, at 22-28 (Filed, Nov. 25, 2002).[19] CLECs

[18]*ISP Remand Order*, at ¶ 70. The WVCAD notes that the Commission's discussion of the traffic imbalances between ILECs and CLECs did not address whether those imbalances occurred in states with CPNP regimes alone, or whether the imbalances also occurred in states with bill-and-keep regimes.

[19]The state commission just recently upheld Verizon-WV's position on 555 traffic. *See* "Commission Order," *North County v. Verizon-WV*, Case No. 02-0254-T-C, at 37-39 (Aug. 28, 2003).

that do not have their own networks accordingly find themselves at a competitive disadvantage in trying to offer similar service to potential ISP customers.

C. Forbearance From Applying The *ISP Remand Order* Is Consistent With The Public Interest.

For the reasons set forth in these comments, as well as in Core's petition to the Commission, forbearance from applying the *ISP Remand Order* is consistent with the public interest. There are obviously serious concerns over the validity of the Commission's rationale for excluding ISP-bound traffic from the reciprocal compensation obligations of Section 251(b)(5), given the D.C. Circuit's remand of the Commission's rulings – not once, but twice. The WVCAD suggests that the Commission continue to forbear from enforcing its *ISP Remand Order* until after it has responded to the D.C. Circuit's remand order(s), and until after such response has undergone that court's judicial review or the time for appealing the Commission's order to that court has expired without an appeal being filed.

IV. CONCLUSION.

For all the foregoing reasons, the Commission should exercise its authority under 47 U.S.C. § 160 and forbear from applying the *ISP Remand Order* to the exchange of ISP-bound traffic between telecommunications carriers.

Respectfully submitted,

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